

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 743 OF 1993

Appasaheb Dattatraya Pawar ..Appellant

versus

1. Balasaheb Dayandeo Naik

2. Kiran Balasaheb Naik

3. Jaywantrao Ganpatrao Dalvi

4. Sudhir Jayawantrao Dalvi ..Respondents

Mr. Nitin Mhatre for Mr. A. K. Abhyankar for the Appellant.

Mr. S. B. Deshmukh for A. V. Anturkar for the Respondents.

CORAM : D. G. DESHPANDE, J.

DATE : 11TH JANUARY, 2005.

ORAL ORDER :

1. Heard learned Counsel for the Appellant and the Respondents. The appellant was the original defendant. Plaintiffs - respondents filed Suit against him for specific performance of agreement valued at Rs.2,12,700/- on the basis of the writing dated 30.7.1985. The lower court decreed the claim for specific performance and therefore the appellant

- defendant filed this appeal.

2. Counsel for the appellant - defendant contended that as per the agreement Exhibit '18' between the parties, time was the essence of the agreement and the time fixed between the parties was six months from 31.7.1985. But the plaintiffs - respondents never showed their willingness to perform their part of the contract nor did they offered balance consideration of Rs.1,92,500/- during the aforesaid period of six months. Therefore the plaintiffs were not entitled to get specific performance. The trial court came to the conclusion that merely because time of six months was mentioned in the agreement Exhibit '18' for completion of the agreement that would not be sufficient to make the time essence of the contract. Counsel for the appellant therefore in this regard relied upon the Judgment of Supreme Court reported in **AIR 1997 SC 1751 K. S. Vidyanadam and others vs. Vairavan**. In this case also an agreement came to be entered into between the plaintiffs and the defendant on 15.12.1978. It was provided that sale deed was to be executed within six months and the purchaser was to purchase stamps within six months at his own expense and then approach the seller for execution of the sale deed. It was also provided that if the purchaser failed to be diligent then the seller was given the right to

forfeit the amount and if the seller avoided than the purchaser was given right to recover Rs.10,000/=. It is in this circumstances that the Supreme Court interpreted the provisions of Section 20 of the Specific Relief Act and held that stipulation of time in the manner aforesaid may not amount to making the time the essence of the contract, but must have some significance. In that case before the Supreme Court also the purchaser before issuing notice after waiting for two and half years, and the Supreme Court in the circumstances held that this could have been done by the purchaser to avoid escalation of the price which resulted in the loss to the seller. In the instant case also agreement specifically fixed the time for sale deed i.e. six months and it is also provided that if the purchaser avoids to complete the transaction within six months the seller will be entitled to forfeit the amount. Judgment of the Supreme Court relied upon by counsel for the Appellant aptly applies in the present case and therefore it was wrong on the part of the trial court to grant equitable relief of specific performance when there is nothing on record on the part of the plaintiffs to show that they were ever ready and willing to perform their part of the contract and pay balance consideration of Rs.1,92,500/= to the defendant - Appellant. There is no evidence of the plaintiffs to show that they

had in their account or have credit or with them cash amount of Rs.1,92,500/= within stipulated period of six months, by which time the agreement was to be executed as per Exhibit '18'. Therefore even considering the pleadings of the plaintiffs that they were ready and willing throughout to perform their part of the contract, there is absolutely no evidence excepting their bare words.

3. Firstly, therefore purpose intended that the agreement should be fulfilled within six months and on the basis of the aforesaid Judgment of the Supreme Court, I hold that fixing the time limit of six months had definitely some significance. Right given to the defendant - appellant to forfeit the amount and obligation cast upon the plaintiffs - respondents to purchase stamp paper and complete the Sale Deed were indicative of performance intending to make time essence of the agreement.

4. The second aspect that has been improperly considered by the trial court in favour of the respondents - plaintiffs is about the readiness and willingness of the respondents to perform their part of the agreement. According to the respondents they had given notice to the appellant - defendant. It was a notice dated 12.7.1988 which was sent by them at the address known to them and they have produced

the postal receipt and copy of the notice. The trial court on the basis of the presumption under Section 114 came to the conclusion that even if the respondents - plaintiffs have failed to produce acknowledgement, notice must be presumed to have been served upon the appellant - defendant.

5. Question of drawing presumption in favour of the respondents - plaintiffs would have arisen if there was no statement on oath of the appellant - defendant that he did not receive the notice. When the appellant - defendant specifically averred in the written statement that he has not received the notice and it was held by his evidence that he has not received the notice then the burden definitely and heavily lie upon the plaintiffs to prove service of the notice. There is no explanation why the plaintiffs could not and did not produce acknowledgement. Admittedly the notice was sent in July 1988 and the evidence was recorded before the lower court after five years. The plaintiff could have by due diligence within the aforesaid period obtained some communication from the postal department whether the notice was served upon the appellant - defendant or not. Nothing was done by the plaintiffs - respondents in this regard.

6. Even if for the sake of arguments it is accepted

that the respondents - plaintiffs had given said notice it does not indicate the bonafides of the respondents - plaintiffs or their willingness to perform their part of the contract. It is pertinent to note that Agreement is dated 31.7.1985 and the notice is given 15 days before the expiry of the period of limitation of three years. Obviously this is done to gain advantage in matter where period of six months has already expired. The plaintiffs were sitting over an amount of Rs.1,92,500/= for two and half years without paying anything out of that to the defendant - appellant. Therefore this notice is nothing but a devise invented by the plaintiffs - respondents to over come any legal lacuna. Giving of notice does not therefore prove that the respondents - plaintiffs were ready and willing to perform their part of the contract. Consideration which they were to pay was fixed at Rs.85,000/= per acre and they had purchased two and half acres of land and they were to pay Rs.2,12,500/- out of which Rs.20,000/= were paid. It is clear that the plaintiffs wanted to capitalise on the basis of the agreement where initial payment was a paltry sum of Rs.20,000/=.

7. Lower court has decided the case entirely on the wrong approach. The findings that the plaintiffs were ready and willing to perform their part of the

contract is wrong and perverse, so also finding that the time was not the essence of the contract. The conduct of the plaintiffs reveal that they were not in a position to pay the balance of consideration to the defendants within stipulated period. Apart from this the most important part in the plaint that was brought to my notice is that they are ready to receive back the amount of consideration of Rs.20,000/= which they have paid to the defendant - appellant. Though they have courage to demand interest on the said sum at the rate of 15% per annum.

8. As regards the plaintiffs are ready to receive back the amount of Rs.20,000/=: firstly, the agreement specifically gave right to the appellant - defendant to forfeit the amount if there was failure on the part of the plaintiffs - respondents to perform their part of the contract. Secondly, the conduct of the Respondents - plaintiffs in issuing notice 15 days before the expiry of limitation, is highly suspicious. Thirdly, nothing is brought on record by the plaintiffs that the entire burden was upon them to prove that they had financial capacity to pay the amount of agreement within six months. This is a case where plaintiffs cannot get any relief.

9. For all these reasons, I pass the following order :

ORDER

Appeal is allowed.

Judgment of the trial court is set aside.

Suit of the Plaintiffs is dismissed.

So far as this Appeal is concerned no order as to costs.

11.1.2005

(D.G. DESHPANDE, J.)